

INFORMATIVE NOTE

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PUBLIC LAW

THE TROIKA AND THE PUBLIC CONTRACTS CODE

The Memorandum of Understanding agreed between the Portuguese State and the Troika¹ which establishes the general conditions on which the provision of financial assistance to Portugal depends was published yesterday.

Among the measures included in the Memorandum, there are a number of commitments in the areas of public procurement with significant impact on the Public Contracts Code (CCP) that is currently in force.

In overall terms, the Portuguese State has made a commitment to use its best endeavours to alter and perfect the current legal framework for public procurement with a view to improving the procedures for making awards, ensuring a more transparent and competitive approach in public purchasing and increasing the efficiency of public spending .

Besides this general commitment, the Portuguese State has specifically assumed the obligation to adopt a series of specific measures in harmony with the provisions of the EU directives on public procurement (2004/17/CE e 2004/18/CE), namely:

1.Alteration of the legal provision in article 2 (2) of the CCP, which provides an

exception from classification as awarding entities and, subsequently, from being subject to the public pre-contractual procedures regulated in the CCP, higher education institutions with the character of a public foundation (provided for and regulated by Law 62/2007, of 10 September) regardless of whether or not they meet the requirements on which their classification as “bodies governed by public law” depends. The Portuguese government is now required to eliminate this system which goes against EU law.

2.Elimination of all special rules (permanent or temporary) which allow public contracts below EU limits to be awarded directly, ensuring the full harmony of the Portuguese system with the provisions in the treaty on the functioning of the European Union.

3.Revision of the system currently enshrined in the CCP on the subject of errors and omissions and extra work, in conformity with EU Directives.

4.Implementation of adequate measures to resolve the problems that currently exist in respect direct award of extra works contracts and to ensure they are carried out in strict compliance with the provisions of the EU Directives.

5.Adoption of measures to make those in charge of the awarding authorities financially responsible in the event of a breach of the rules for public procurement as recommended by the Court of Auditors.

¹The word ‘Troika’ has been adopted in Portugal to describe the International Monetary Fund, the European Central Bank and the European Commission as a group in their role in the country’s financial assistance programme.

6. Guarantee of prior supervision of public contracts by the national bodies with jurisdiction to do so in order to prevent and combat unlawful award practices in respect of extra works and to increase transparency in public procurement.

This is perhaps the measure that is most complex in terms of its implementation because of the slow-down it could cause in carrying out a project.

7. Modernisation of the public contracts portal, known as BASE, in accordance with the recommendations set out in Resolution of the Assembly of the Republic no. 17/2010, with a view to increasing transparency in public pre-contractual proceedings.

8. Modification of article 42 of the CCP, which provides that the tender specifications for contracts of a value equal to or greater than €25 000 000 must specify an obligation on the part of the successful bidder to prepare one or a number of research and development (R&D) projects directly related the performance of the contract, to be carried out in the country in order to ensure full compliance with the provisions of the EU Directives.

Naturally everything will depend on whether or not these commitments are brought to fruition but we must recognise that the changes to be made to the CCP are clearly a step in the right direction.

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